makes the affidavit *qua* affidavit entirely inadmissible. Certainly there may be cases in which an affidavit sworn a day or two previously, or even affidavits which have not been sworn, have been used on interlocutory applications, on counsel's undertaking that the affidavit shall be re-sworn or sworn and filed as the case may be. But when the strict rules are relaxed in such instances the principle is not sacrificed, as the court acts on the assumption that counsel's undertaking will be honoured, and when that has been done the requirement of the court's practice has been fully complied with."

In *Stacey's* case, the element of the death of Hunter was of primary consideration and therefore the question of non-availability of witness became the subject for substantial discussion. The court said:

"Hunter's letter therefore is *prima facie* inadmissible as an affidavit in these proceedings and as he is dead it never can become admissible by being resworn.

Even if from any point of view it could be treated as an affidavit in an intended action there is still the fatal objection that the plaintiff has never had the opportunity of cross-examining Hunter."

In the *Sri Melati* case,[3] the learned judge distinguished *Stacey's* case. He said (p. 285):

"In *Stacey's* case the affidavit was to be used to prove facts at a trial at which issues were to be adjudicated on and the deponent was dead. In this case no such facts were being proved. The affidavit was in support of a request for a warrant of arrest of a vessel in an admiralty action. Both the affidavit and the request for warrant were filed, according to the court records, after the filing of the writ. The trial of the issues are not before the court. (The law only requires that the warrant of arrest should be issued after the issue of writ.) The deponent is always available for cross-examination but no application has been made to do so."

I am unable to accept the contention of learned counsel that Arulanandom J. was wrong in his interpretation of *Stacey's* case on the ground that he relied on the element of the death of the deponent. The death of the deponent (Hunter) was relevant and a material point to be considered as it was a case which required the production of evidence at a trial.

As regards the date of the affidavit, the learned judge saw nothing improper as it had been filed according to the rules. In the present case before me, the difference was only one day. In fact, the affidavit was sworn on the afternoon of 12 November 1987 and the statement of claim accompanying the writ was dated the same day. The writ was filed in the registry on the following day, *i.e.* the 13th. If, in the present case, it is insisted upon that there was still that difference of one day, I am of the view that it did not affect its validity unless it can be shown that it is improper which learned counsel for the applicants/defendants had not done. Similarly in the case of *Ong Heok & Anor.* v. *Ooi Bee Tat & Ors.*[4] the affidavit in support of the application for injunction was sworn one day before the issue of the writ, and the learned judge did not find it improper. Also in the present case the question of non-availability of witness did not arise as he was available for cross-examination if requested for.

The third objection by learned counsel for the applicants/defendants was that the action taken by the respondents/plaintiffs by applying for attachment was misconceived or improper. He maintained that the respondents/plaintiffs should have injuncted the applicants/defendants from removing his equipment from the factory. The respondents/plaintiffs, according to him, was not justified on the facts to proceed under section 19 of the Debtors Ordinance 1957. In my view they are at liberty to choose any form of redress. Also, from the facts as deposed, I find that the respondents/plaintiffs have satisfied section 19(1)(c). The applicants/defendants had removed some of the goods from the factory and this was admitted and some he had even sold.

In the circumstances, I dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Balendran Chong Haranay & Bodi; Anthony Fernandez & Partners.*

PUBLIC PROSECUTOR v. ABDUL KUDUS BIN JAPLUS

[O.Cr.J. (K.C. Vohrah J.) 11 March 1988]

[Kuala Lumpur – Federal Territory Criminal Trial No. 2 of 1984]

Criminal Law – Dangerous drugs – Trafficking in – Drugs found in cupboard in room – Accused's brother has access to room and cupboard – Whether defence story raises a reasonable doubt in the prosecution case – Dangerous Drugs Act 1952, s. 39B(1)(a).

Evidence – Evidence of statement leading to discovery of drugs – Explanation of – Evidence Act 1950, s. 27.

Evidence – Impeachment of credit of defence witness – Evidence Act 1950, ss. 145 & 155(1).

In this case, the accused was charged with trafficking in dangerous drugs weighing a total of 15.87 grammes. The accused was arrested in a police ambush. He led the police team to a house where he stayed with his brother Idris. He showed the police a room in which there was a cupboard. The cupboard door was unlocked and inside the cupboard there was a brief case. The keys that were used to unlock the doors of the room and the cupboard were found on the accused when he was arrested. Inside the briefcase, the police found two black-coloured receptacles and a white tissue paper in which there were seven plastic packets. The two receptacles and the seven packets contained the drugs.

The accused stated in his defence that he and his brother Idris were both drug addicts. He stated that both of them had access to the room and cupboard. He also stated that the seven packets belonged to Idris and not him. He admitted, however, to the possession of the two receptacles.

Held: (1) all in all, the defence story that there was such an arrangement is not implausible and the assertion of the accused that the seven packets of heroin in his brief case were Idris' and Idris' admission that they were his, coupled with the evidence of their father that Idris admitted to him that the seven packets were his, could probably be true. The defence has succeeded in raising a reasonable doubt in the prosecution's case from which a inference from the primary facts had been drawn that the accused was in possession of all the drugs in the brief case;

(2) the accused was, however, guilty of possessing the two receptacles containing 7.82 grammes of heroin and he was therefore convicted for that possession.

Cases referred to:

(1) *Yee Ya Mang* v. *Public Prosecutor* [1972] 1 M.L.J. 120 (expld).
(2) *Pulukuri Kotayya* v. *King Emperor* A.I.R. 1974 P.C. 62 (refd).
(3) *Chong Soon Koy* v. *Public Prosecutor* [1977] 2 M.L.J. 78 (refd).
(4) *Dato Mokhtar bin Hashim & Anor.* v. *Public Prosecutor* [1983] 2 M.L.J. 232 (folld).
(5) *R.* v. *Golder* (1961) 45 Cr. App. R. 5 (refd).
(6) *R.* v. *Jackson* [1964] Qd. R. 26 (refd).
(7) *Driscoll* v. *R.* (1977) 51 A.L.R. 731 (refd).
(8) *R.* v. *Pestano & Ors.* [1981] Crim. L.R. 397 (consd).
(9) *Homeshwar Singh* v. *Kameshwar* A.I.R. 1935 P.C. 146 (cited).
(10) *Muthusamy* v. *Public Prosecutor* [1948] M.L.J. 57 (cited).

CRIMINAL TRIAL.

Zaini bin Abdul Rahman (Deputy Public Prosecutor) for the Public Prosecutor.

Sidney Augustine for the accused.

Cur. Adv. Vult.

K.C. Vohrah J.: The accused was charged as follows:

"That you on 6 September 1983 at about 11.00 p.m. at No. 29, Persiaran Keramat Hujung, Kampong Datok Keramat, in the Federal Territory of Kuala Lumpur, on your own behalf, did traffic in dangerous drugs, to wit 7 plastic packets and 2 plastic receptacles of heroin weighing a total of 15.87 grammes and that you have thereby contravened section 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised Act 234/80) and punishable under section 39B(2) of the same Act as amended by Act A553 of 1983."

The evidence was that the accused was detained at an ambush at Jalan Raja Muda, Kuala Lumpur near the Institute of Medical Research at about 10.30 p.m. on 6 September 1983. A bunch of keys (P12) was recovered from his right trousers pocket and he was asked by Inspector Moktar (PW4) who had detained him and found the bunch of keys:

"Ada tak lagi dadah disimpan di rumah kamu?"
("Are there any more drugs kept in your house?")

The accused replied:

"Ada."

("Yes.")

PW4 and his team comprising Detective Corporal Zaharin (PW5), Detective Constables Zakee and Kamaruddin then proceeded with the accused to a house No. 29, Persiaran Keramat Hujung, Kampong Datok Keramat, Kuala Lumpur. They went to the back door of the house. The accused then called out to his younger brother, Idris bin Japlus, who let them in.

The accused then showed PW4 and two of his team, Corporal Zaharin and DPC Zakee, a room in the house on the ground floor.

The accused had his hands handcuffed to the back then. He was re-handcuffed with his hands in front by DPC Zakee on PW4's instructions. The accused then used one of the three keys from the bunch of keys (P12), recovered by Inspector Moktar from his pocket, to unlock the door to the room.

In the room PW4 asked the accused, "Where are the drugs?" The accused answered, "Inside the cupboard." PW4 tried to open the left door to this cupboard but found it was locked. PW4 then instructed the accused to use one of the keys from the bunch of keys to unlock the left door of the cupboard. The door was unlocked through the use of one of the keys. The accused then showed PW4 a brief case which was inside the cupboard. PW4 tried to open it but found it was locked;

the brief case had a combination lock on either side of the brief case. With the assistance of the accused who gave the combination numbers, "100" for the left lock and "101" for the right lock, the brief case was unlocked.

PW4 found in the brief case two black-coloured receptacles (P7 and P8) and a white tissue paper (P4) in which was wrapped seven plastic packets. A rubber band (P9) was around the tissue paper package. The two black-coloured receptacles and the seven plastic packets contained a granular substance. There was nothing else in the brief case.

A search was made of the room which had a wooden platform with a mattress on it and no other incriminating thing was found in the room. The accused and the seized items were then brought to the Jalan Bandar Police Station.

The relevant facts so far recounted came from the evidence of PW4, Inspector Moktar.

Detective Corporal Zaharin, PW5, recounted substantially the same facts relating to the detention of the accused at Jalan Raja Muda, the discovery of the bunch of keys in his right trousers pocket, the answer "Yes" by the accused to PW4's question whether there were more drugs in his house, their going to the house, the opening of the back door by Idris, the bringing by the accused of the police to a room, the unlocking of the door to this room by the accused using one of the keys from the bunch of three keys recovered from his pockets and the unlocking of the left cupboard door by the accused who used another of the keys from the bunch. PW5 said that PW4 had asked the accused, "Where is the drug you have kept?"; and the accused replied "In this cupboard."

He said the cupboard had two doors and upon PW4's instruction the accused unlocked the left door of the cupboard, took out a brief case which he handed to PW4, Inspector Moktar. PW4 instructed the accused to unlock the brief case which he did and two black-coloured receptacles and a white tissue paper package in which was wrapped seven plastic packets were found in the brief case.

PW5 said that the other side of the cupboard was not searched as the right door was not opened. He said after his arrest, at the office, the accused stated that he was a drug addict.

The investigating officer of this case, Inspector Dzulkifli, PW2, stated that two days after the arrest of the accused he went to the said house with PW4, PW5, a police photographer (PW3) and the accused. He used one of the keys in the bunch of keys (P12) to unlock the door to a room and he saw a wooden platform with a mattress on it. He also saw a cupboard with two doors. PW2 recovered from the left side of the cupboard a wallet (P15) which contained a birth certificate (P16) in the name of Abdul Kudus bin Japlus (the name of the accused) and a photograph (P17). On the platform in the room he found a plastic name tag (P18) bearing the words: "APA Supervisor 45 Abd. Kudus Hj. Japlus".

PW5 also stated that he sent the granular substance in the seven plastic packets (P5A to G) and the two receptacles (P7 and P8) to the chemist for analysis.

According to the chemist, Encik Khoo Ah Kow, after analysis of the substances in the seven plastic packets and the two other receptacles, he found the substance in the seven packets (P5A to G) to contain 8.05 grammes of heroin and the substances in the two other receptacles P7 and P8 to contain 3.86 grammes and 3.96 grammes of heroin respectively. Thus the total weight of heroin came to 15.87 grammes.

Defence counsel had objected to the admissibility of the evidence regarding the question put by Inspector Moktar to the accused whether there were any more drugs in his house and the accused's reply of "Yes." His objection was that the information by the accused did not lead to the "recovery" of the drug and that on the basis of *Yee Ya Mang* v. *Public Prosecutor*[1] the thing recovered should in the first place have had the characteristic feature of having being "hidden". With great respect to learned counsel, the provisions of section 27 of the Evidence Act 1950 have been misconstrued and *Yee's* case did not decide that the thing recovered must in the first place have been "hidden". Having regard to the case of *Pulukuri Kotayya* v. *King Emperor*[2] and *Chong Soon Koy* v. *Public Prosecutor*[3] the bit of information given by the accused is admissible under the provisions of section 27 of the Evidence Act 1950 as the "fact deposed as discovered" mentioned therein was not only the heroin in the house but the knowledge of the accused as to this; and the information that drugs were kept in his house supplied by the accused to Inspector Moktar distinctly related to the discovery of this heroin in the house where it was kept.

Before dealing with the question whether a *prima facie* case against the accused on the charge had been made, I would like to deal with the evidence of the various prosecution witnesses adduced during their cross-examination. It was established that on the night the room was searched and the heroin discovered, only that room was searched; no other place in the house was searched. It was also established that no investigation had been made to find out if anyone else had duplicates of the keys in the bunch of keys seized from the accused; and Inspector Moktar stated that he did not know if anyone else had access to the room nor which room Idris, the accused's brother, was occupying. It was also established that Idris had been a drug dependant for a long time and that on 16 February 1988 he had been released from Pudu Prison after serving sentences for the possession of heroin and for administering heroin to himself; this was so stated by Inspector Dzulkifli under cross-examination. Inspector Dzulkifli also stated that he had occasion to detain Idris "in connection with heroin" after the accused had been arrested. With regard to the accused, Detective Corporal Zaharin did state that the accused had told him he was a drug addict in the office of the police station on the day of his arrest but he said he did not know if the accused was a drug addict.

Nothing, however, in the evidence adduced through cross-examination, to my mind, affected the prosecution's *prima facie* case at the close of its case. It is of course clear that the bit of information about more drugs being kept in the house and the other bit about the drugs being in the cupboard supplied by the accused led to the discovery of the heroin in a brief case kept in the cupboard in a room in the house. But these bits of information coupled with the discovery of the drugs, however, were merely indicative of the fact that the accused had knowledge of the drugs kept in the brief case, not that he had possession, control or custody of the drugs. The prosecution, however, did not rely on these bits of information which led to the discovery of the drugs as the foundation of its case against the accused. The prosecution also relied on other primary facts which, considered cumulatively, showed that the accused had exclusive knowledge as to where the drugs were kept, consistent with the inference that he had possession of the drugs which had been discovered. There was the evidence that the accused had himself unlocked the brief case, using the digits "100" and "101" to unlock the left and right combination locks respectively of the brief case from which heroin was recovered. There was also the evidence that he unlocked the door to the room using a key from the bunch of keys which was recovered from him. It was also in this room that the name tag of the accused was found. The accused unlocked the left door of the cupboard and it was in this left side of the cupboard that the brief case was kept. It was also in this left side of the cupboard that the investigating officer, PW2, discovered a wallet which contained the accused's birth certificate. It seems clear that the bits of information given by the accused which led to the discovery of the drugs in the brief case when linked to these primary facts showed that the accused had possession of the heroin found in the brief case. The prosecution's case was not inherently incredible and to my mind a *prima facie* case of trafficking as specified in the charge had been made out bearing in mind the presumption under section 37(d) of the Dangerous Drugs Act 1952 that he knew the drugs were heroin and the presumption under section 37(da)(i) that he was trafficking in the 15.87 grammes of heroin.

I called upon the accused to make his defence on the charge.

Defence

The accused elected to give sworn evidence. In gist, his defence was that the heroin in the two black receptacles in the brief case belonged to him for his own consumption but that the seven packets of heroin wrapped in the tissue paper belonged to his younger brother Idris who was also a drug addict; he had given permission to Idris to keep drugs in his brief case which was kept locked in his (accused's) room.

The accused stated that he was a drug addict since 1974 when he started on ganja. He then became a heroin addict and when he took part as stunt man in dangerous stunts in movies the heroin made him more confident and brave. His addiction landed him with three previous convictions for possession of heroin and his possession of heroin in each of the three cases was for his own consumption. He said his brother Idris who had been a commando in the army was also a drug addict since 1978 and he and his brother had undergone "traditional treatment" to kick their habits but to no avail.

He said that four to five months prior to his arrest he shifted to a room which had been added to the house sometime in 1980 to serve as a prayer room for his father. The room was also

used as a store for old clothes and books. Before that, he occupied a room at the back of the house with his three brothers; this included Idris save for the time Idris was in the army. Since he was a drug dependant and since he always went to bed late – and his brothers sometimes had to sleep in the hall on his account – he decided to shift to this room. One night after he had shifted to the room, he discussed with Idris the reason for his shifting; he also told him that he did not wish his family to get into trouble on account of his and Idris' addiction to drugs and he told Idris that if Idris had drugs he should not keep them in the room which Idris occupied but Idris replied that he had no other place to keep the drugs. The accused said he then made the decision that Idris could keep his drugs temporarily in his (accused's) brief case in his (accused's) room and that the drugs could only be kept during the daytime. This related to the excess drugs not needed for the day's consumption; he said Idris took heroin four times a day. He then gave the combination digits to the locks of the brief case. And he told Idris to get spare keys to his room and his cupboard from the keys in a drawer of the kitchen cabinet and he instructed him to replace them in the drawer after use.

He said that for himself he kept drugs for his own consumption in two film plastic containers, P7 and P8, which were in the brief case. He said on two or three occasions when he went to take drugs during the daytime for his own consumption he saw a small package in the brief case on each occasion which he believed to be Idris'.

He said on the day of his arrest he left home in the morning after taking a bit from his stock for his own consumption from the black receptacles and at that time the package was not there.

The accused's brother, Idris, DW4, said that the seven packets of drugs in the brief case were his. He recounted that he was in the army as a commando from 1981 until 1983 when he was dishonourably discharged from the army having been absent without leave because of his involvement in drugs. He said he started taking drugs before he sat for his school examination in 1975. He had started on ganja and had gone on to heroin. When he joined the army in 1981 he was a drug addict. He consumed less drugs while underoing training until he succeeded in kicking the habit but later he became addicted again. And when he was discharged from the army in 1983 his drug addiction was worse than before. He said he had just been released from prison on 16 February 1988 after having served concurrent sentences on a charge of being in possession of heroin and another charge of having administered a (dangerous) drug to himself.

Idris said that two or three months before the accused's arrest the accused told him that if he had any drugs he should not keep them in the room where he (Idris) slept with his two other brothers as "he did not want my other two brothers to get involved in case anything happens". Idris said that the accused advised him that if he possessed drugs he could keep them in a bag in the cupboard in his room as it would be safer. Idris explained that his cupboard in the room he shared with his two other brothers had no lock. He said the accused gave him the combination digits to the locks of his bag. The accused told him to make use of the keys kept in the kitchen cabinet to unlock the doors to his room and the cupboard. Idris tested the keys from the drawer and found they fitted the relevant locks. He said the accused told him that "if I wanted to keep my drugs there for one day it is okay".

Idris said that prior to the day of the arrest of the accused he had kept drugs in the accused's brief case on two or three occasions. He said he normally kept two to three packets, and a packet would normally have lasted three to four days. Normally he would take some and keep the rest outside the house. He said on 6 September 1983, the date of arrest of the accused, he had purchased seven packets of drugs, a larger quantity than he had previously purchased; he had the seven packets from a friend at a special price and he had kept them in the brief case after wrapping them in a soft tissue paper and putting a rubber band round it pending seeking the accused's advice whether he could keep the drugs in accused's brief case longer than one day. He said he was waiting for the accused to come back that night to seek the accused's advice and the accused, however, came back to the house with the police.

He informed his father, DW3, about the accused's arrest on the morning of 7 September 1983 and admitted to his father that the seven packets of drugs were his. He said his father told him to admit to the possession of the seven packets to the police but he was afraid and confused and he did not inform the police about it. He showed his father the spare keys and his father told him to keep them for safekeeping in a cupboard until they (D22 and D23) were produced in court.

It has to be stated here that Idris admitted he lied to Inspector Dzulkifli on several points when he gave a statement to him in 1983 stating that he had never gone to the accused's room when the latter was not in the room, that he had never kept anything in the accused's room, that the drugs in the accused's brief case did not belong to him and that he did not have any duplicate key to the cupboard where the drug (in the brief case) was discovered.

His credit was sought to be impugned under sections 145 and 155(c) of the Evidence Act 1950. The Federal Court in *Dato Moktar bin Hashim & Anor.* v. *Public Prosecutor*[4] (at p. 276) has held that when a witness' credit is sought to be impugned under the said provisions his credit stands to be assessed as a whole together with the rest of the evidence at the appropriate stage, that is to say, at the close of the case for the prosecution or for the defence, as the case may be. I thus have to assess Idris' credit by viewing his evidence as a whole together with the rest of the evidence.

Now, Idris made previous statements which are inconsistent with his evidence in the trial. Should the court, which acts as judge and jury, treat his evidence in the trial as unreliable? In *R.* v. *Golder*[5] (at p. 11), the English Court of Appeal decided that a jury should receive a clear warning that "when a witness is shown to have made previous statements inconsistent with the evidence given by that witness, *the jury should* not merely *be directed that the evidence given at the trial should be regarded as unreliable;* they should also be directed that the previous statements whether sworn or unsworn do not constitute evidence upon which they can act." (Emphasis mine.)

The first part of the above statement, if it was intended to be an inflexible rule, was considered by the author of *Cross on Evidence* 5th Ed., p. 244 as questionable because allowance must at least be made for the case in which the witness gives a *prima facie* satisfactory explanation of the inconsistency, relying on remarks in *R.* v. *Jackson*[6] at p. 29 and p. 40 which were approved in the High Court in Australia in *Driscoll* v. *R.*[7] at p. 740. In 1981 the rule in *Golder* was, however, modified in *R.* v. *Pestano and Others.*[8] In this case, a prosecution witness, having incriminated two of the defendants, in part resiled from his deposition in so far as it affected the other two. Prosecution counsel then asked various questions designed to show that the witness was lying before making a successful application to treat him as hostile. He was asked about his deposition and another deposition in a different case. The witness did not return to the account given in his deposition but the prosecution nevertheless continued to rely on his evidence in so far as it advanced their case. In dismissing the appeals, the Criminal Court of Appeal held that the evidence was for the jury to consider subject to a proper warning from the judge as to the weight, if any, which could be attached to it.

And in assessing his credit, I should also have to bear in mind the Privy Council case of *Homeshwar Singh* v. *Kameshwar*[9] (at p. 149) where it was held that if a witness denies a fact in the course of his evidence and it is proved that on a previous occasion he made a statement admitting it, that does not prevent his deposition from going in as evidence in the case, though it weakens its value so far as to make it unsafe to act upon it without corroboration.

Needless to say, whatever my assessment of his credit, his various denials in the police statement cannot become his evidence (see *Muthusamy* v. *Public Prosecutor*[10] at p. 58).

Reverting to Idris, in gist his explanation for his lies was that he feared that he with his severe addiction would be detained and that he would therefore be deprived of heroin; he also felt since "my brother had been arrested because of the drugs why should both of us be arrested; let him alone be arrested." His explanation for his lies has to be viewed in the context of his state of mind whilst being a drug addict. It is common knowledge that withdrawal symptoms suffered by a drug addict when deprived of his supply of drugs can be harrowingly painful and telling lies so as not to be deprived of his supply of drugs would not be unnatural. But his evidence which he gave during the trial should be viewed in the context of his having just been released from prison which, according to prisons officer DW2, was slightly over two weeks before Idris gave his evidence. I can take it that Idris was clear from the effects of drug addiction at the time he gave his evidence. Idris' explanation for his lies appears credible but his evidence in the trial has nevertheless to be treated with the utmost caution bearing in mind that I would have to seek corroboration of his testimony elsewhere.

The father of the accused, DW3, stated that both the accused and Idris were drug addicts and that he tried to get them cured through traditional treatment but to no avail. He confirmed that on 7

September 1983 Idris informed him of the accused's arrest and that Idris admitted to him that the seven packets belonged to him. He had asked Idris to admit to the police if they belonged to him but Idris had stated that if he were to inform the police about it he (Idris) would get involved too. He said Idris showed him where he got the keys to Kudus' room and cupboard and he told Idris to keep them in safe custody.

Another witness, DW2, the officer in charge of records at Pudu Prison, stated that Idris was sentenced on 21 January 1988 to 12 months' imprisonment for the offence of possession of dangerous drugs under section 12(2) of the Dangerous Drugs Act and nine months for another offence of self-administration of a dangerous drug under section 15(a) of the same Act, the sentences taking effect from the date of arrest, 18 June 1987.

I now come to the evaluation of the totality of the evidence. As regards the assertion that the accused was a drug addict at the time of his arrest, I take into consideration that Detective Corporal Zaharin (PW5) had stated that the accused had told him that he was a drug addict. I have no reason to disbelieve the testimony of the accused and his father that he (the accused) was a drug addict on the day of his arrest bearing in mind his admission that he had previous convictions for possession of heroin and the heroin was for his own consumption. That he was a drug addict in any event was not really seriously challenged by the prosecution. I also have no reason to disbelieve the evidence for the defence that Idris himself was a drug addict at the time of the accused's arrest; the father's evidence, not seriously challenged, corroborates the accused's and Idris' evidence that Idris was a drug addict before and at the time of the accused's arrest.

Before I deal with the main issue whether the seven packets of drugs were Idris' and not the accused's, let me deal with the matter of the duplicate keys to the accused's room and the cupboard in his room. Two bunches of keys (D22 and D23) were produced by Idris. Both the accused and Idris said that one key (D23A) from D23 was for the lock to the room and two from D22 were for the left and right locks of the cupboard. There was considerable effort on the part of the prosecution to show that the keys produced could not have been in existence at the time the accused was arrested. It will be remembered that during the prosecution's case the defence established that the police did not search for duplicate keys to the accused's room and cupboard. That the duplicate keys to these were in bunches in a drawer of the kitchen cabinet at the time of the arrest of the accused is probable; most families leave spare keys for the various locks in their house either in the drawer of a cabinet in the kitchen, dining room or sitting room and in any event the police did not search any part of the house except the accused's room nor looked for duplicate keys.

But whether these keys were actually used by Idris to gain access to the accused's room and cupboard in order that he could keep his supply of drugs in the brief case is a different issue. This has to be viewed in the context of the defence story that after Idris was dishonourably discharged from the army he was still a drug addict and that the accused who was also a drug addict discussed with Idris that they should not jeopardize the family because of their drug addiction; and that the accused had told Idris not to keep his drugs in the room which Idris occupied with his two brothers but to keep them in a brief case in the accused's cupboard; the accused supplied the combination digits to the locks of the brief case and told Idris to make use of the spare keys, which were lying in a drawer of a cabinet, to gain access to his room and cupboard. This was the story of the accused and this, too, was the story of Idris. Idris, whose evidence has to be treated with caution as previously explained, said he had related the matter of the discovery of drugs in the accused's brief case and that he had admitted to his father that the seven packets which were in the brief case were his and that he had used the spare keys in a kitchen drawer, which he showed to him, to gain access to the accused's room and cupboard. The father, DW3, gave similar unshaken evidence that Idris had told him these things. It seems to me that there could be some truth in that there was this arrangement between the accused and Idris where Idris could keep his supply of drugs in the accused's brief case. It was to keep Idris' drugs which were not required immediately for his consumption for the day. It was an elder brother's concern for the rest of his family especially his two other brothers who shared the room with Idris that they should not be involved with drugs; he did not want them to be put into jeopardy. I can believe that Idris did have a cupboard to which there was no lock and it seems a fair inference that drugs should not be kept in the cupboard lest there should be the prying eyes and inquisitive hands of his family especially those of his other brothers. But is it not strange that Idris was allowed to keep his excess

drugs there only during the daytime and not at night? But then would it also not be a fair inference that Idris' physical presence in his room at night would deter his family especially his brothers from rummaging in his cupboard?

All in all the defence story that there was such an arrangement is not implausible and the assertion of the accused that the seven packets of heroin in his brief case were Idris' and Idris' admission that they were his, coupled with the evidence of their father that Idris admitted to him that the seven packets were his, could probably be true. In the result, I find that the defence has succeeded in raising a reasonable doubt on the prosecution's case from which an inference from the primary facts had been drawn that the accused was in possession of all the drugs in the brief case.

But the accused has admitted to the possession of the 7.82 grammes of heroin found in the two black receptacles in the brief case. On his own admission which is believable, I find him guilty and convict him for the offence of being in possession of 7.82 grammes of heroin without being so authorized under the Dangerous Drugs Act 1952 or the regulations made thereunder under section 12(2) of the Act. He is to be punished under section 39A as the provision stood on the date of his offence. Defence counsel may now make his plea in mitigation.

Order accordingly.

Solicitor: *Augustine-Negrin & Co.*

WINTHROP PRODUCTS INC. & ANOR. v. SUN OCEAN (M) SDN. BHD. & ANOR.

[O.C.J. (V.C. George J.) 23 January 1988]

[Kuala Lumpur – Civil Suit No. C120 of 1981]

Trade Marks – Product manufactured in United Kingdom sold in Malaysia – Whether infringement of trade mark – Passing off – Trade Marks Ordinance (No. 26 of 1950), s. 52(3)(a).

This case concerned the well-known analgesic Panadol. "Panadol" was the trade mark under which the analgesic was sold. The owner of the trade mark was the Sterling group of companies. This group had various companies all over the world owning and using the trade mark. In Malaysia, it was owned by the first plaintiff who also has the registered-user rights of the mark in the U.K. The second plaintiff was registered in Malaysia as the sole registered user of the mark.

In the U.K., the analgesic was produced as tablets and was offered for sale in blue packs under the trade mark. There was nothing on the pack to suggest any territorial restrictions in respect of the sale of the product.

The plaintiffs' complaint against the defendants was that the second defendant imported into Malaysia the blue pack Panadol which they had obtained from the British domestic market and that they had sold such Panadol in the Malaysian market through, *inter alia*, the first defendant. It was contended for the plaintiffs that such importation and sale of the blue pack Panadol in Malaysia infringes the first plaintiff's proprietorship and the second plaintiff's user rights in the Panadol trade mark.

It was also contended that the defendants had by putting the blue pack Panadol in the Malaysian market practised a deception on the Malaysian public that amounts to a passing off of the blue pack Panadol as being that of the plaintiffs.

Held, dismissing the plaintiffs' claim: (1) the first plaintiff, having a registered-user right in respect of the mark in the U.K. and ownership in the mark in Malaysia, could manufacture and sell the product Panadol in the U.K. and in Malaysia. Under the trade mark law, there was nothing to stop them from exporting their products from the U.K. to, say, Malaysia and vice versa. There was, and is, nothing in the trade mark law to stop them, or for that matter any trader, from exporting Panadol made in the U.K. by either the first plaintiff or by the Sterling Winthrop Group Ltd. other than any contractual restrictions that there may have been imposed. There were no such contractual restrictions;

(2) the proprietorship and/or registered user of a trade mark has the right to prevent deception as to the origin of the goods but such proprietorship or user right per se does not give a right to control dealings with the goods. Some measure of contractual control may be provided for but trade mark laws certainly do not give rights of control;

(3) where a parent company (or a group of companies) chooses to manufacture and sell wholly or partly through subsidiary companies in different parts of the world products which bear the same trade mark, neither the parent nor any member of the group nor any subsidiary can complain in Malaysia if those products are sold and resold under the trade mark. A purchaser of the analgesic Panadol manufactured and/or sold by a Sterling company and sold under the Panadol trade mark whether in Malaysia or in the U.K. or in any other part of the world is at least entitled to assume that he will not be sued by a Sterling company in Malaysia or in the U.K. or anywhere else merely because of the place of manufacture of the product which he has acquired under the trade mark Panadol. The legal ownership of the trade mark Panadol enables the proprietor to protect in Malaysia the reputation and goodwill of the owner and of the group of which the owner is a member by ensuring that no goods are sold with the mark unless they are produced and labelled by a Sterling company. The legal ownership of the mark does not go further and enable the owner or registered owner to ensure that products manufactured elsewhere (*e.g.* in the U.K. or in the U.S.A.) are not sold within the territory of Malaysia. Neither common law nor the statute law of Malaysia allows this;